BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The only Court which rendered any opinion is the Court of Appeals which is reported in 288 N. Y. 270, and is found at pages 1-10, Vol. III, of the record.

Jurisdiction.

The jurisdiction is developed at page 5 of the petition.

Statement of the Case, Questions Presented, Statutes Involved, Etc.

The statement of the case, the questions presented, and specifications of errors to be urged have been set forth in the petition.

ARGUMENT.

1 (a) There Being No Judicial Sale Involved, the Summary Proceedings in the New York State Courts Without Any Statutory Authority Therefor, and the Denial to the Petitioner of a Hearing, Argument and Opportunity to Present Evidence on a Triable Issue of Fact Involving Property Rights, Constituted a Deprivation by the Petitioner of Its Property Without Due Process of Law in Violation of the Fourteenth Amendment of the Constitution of the United States.

We contend that the Courts below have given such a construction to the Constitution of the United States, as applied to the facts in this case, as to deprive the petitioner of its property without due process of law.

The constitutional question was properly raised in all the Courts, and the Court of Appeals says in its remittitur:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The appellants argued that the orders made by the Special Term of the Supreme Court, affirmed by the Appellate Division, are violative of, and repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that said order of the Special Term of the Supreme Court, affirmed by the Appellate Division, are not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States, insofar as Paragon Land Corporation was concerned."

The order to show cause dated the 23rd day of May, 1940, signed by a Justice of the Supreme Court (R. 7-8, Vol. I), and the so-called proceedings thereafter wherein the petitioner appeared specially and objected to the jurisdiction of the Court over the petitioner and property involved, which resulted in the order dated August 6th, 1940 (R. 4-6, Vol. I), necessarily did violence to the petitioner's constitutional rights, and was without statutory authority or precedent.

The agreement between the trustees as sellers and the petitioner as purchaser of certain land owned by the County of Nassau, State of New York, which had formerly been owned by the said trustees, did not constitute a judicial sale under the decisions of this Court later referred to. A dispute having arisen with respect to the said contract, any alleged claim by any of the parties thereto with respect to said contract, could only be enforced in the usual form of action wherein judgment can only be rendered after a hearing, argument and the examination of witnesses. There is no authority for the enforcement of the alleged claims of any party to the contract summarily as was done in this case.

The denial of an opportunity to a litigant to present evidence and be heard on a triable issue of fact involving property rights is a denial of due process of law as guaranteed by the Constitution of the United States. This Court so held in the cases of *Ochoa* v. *Hernandez*, 230 U. S. 130; *Saunders* v. *Shaw*, 244 U. S. 317; *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U. S. 278.

In the recent case of *Morgan* v. *United States*, 298 U. S. 468, this Court said at page 480:

> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceeding in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

Again in the case of *Shields* v. *Utah, Idaho R. Co.*, 305 U. S. 177, this Court said at page 182:

> "The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.' The 'hearing' is 'the hearing of evidence and argument.' *Morgan* v. *United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist."

In re *National Labor Board*, 304 U. S. 486, 58 S. Ct. 1001, 1005, 82 L. Ed. 1482, this Court said:

"Jurisdiction as the term is to be applied in this instance, is the power to hear and determine the controversy presented, in a given set of circumstances. A court has jurisdiction, in another use of the term, to examine the question whether that power is conferred upon it in the circumstances disclosed but if it finds such power is not granted it lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith."

In *New York Life Insurance Co.* v. *Guttag Corp.*, 265 N. Y. 392, the New York Court of Appeals reiterated the well established principle of law that substantial questions of fact should not be decided on affidavits because that does not constitute due process of law.

In the case at bar, there was a very serious dispute between the parties and under no circumstances should the issues have been decided on affidavits even if it were assumed that the Court had jurisdiction which petitioner contends, however, it did not have.

The petitioner has been deprived of its property without due process of law in violation of the Constitution of the United States.

1 (b) The Real Property Which Was the Subject Matter of the Said Contract of Sale Was Owned by the County of Nassau and Was Not in the Possession or Under the Control of the Court. The Agreement and the Stipulation, If They Have Any Legal Significance, Constituted a Private Sale, If Any, and Not a Judicial Sale.

The Court of Appeals erred in holding that the agreement by the trustees to sell to the petitioner land which they did not own but which was owned by the County of Nassau, constituted a judicial sale.

In its opinion the Court of Appeals said:

"The trustees were appointed by the court pursuant to statute. The appellants were not originally parties to the proceedings brought pursuant to the statute for the formulation and approval of the plan and for the appointment of the trustees. In the statutory proceeding the court at Special Term has no jurisdiction over the subject matter of any application for relief which the statute does not expressly or impliedly authorize the court to grant, nor does the court have jurisdiction of the person of any corporation or individual who is not a party to the proceeding. Under the provisions of the statute and the plan formulated and approved pursuant to those provisions, the trustees appointed by the court were empowered to sell the trust property only with the approval of the court. Paragon Land Corp. agreed to purchase the property subject to the approval of the court. By entering into that agreement Paragon Land Corp. submitted itself, at least to that extent, to the jurisdiction of the court and became a party to the proceeding.

There can be no doubt that the purchaser upon a judicial sale made under the direction of the court and subject to the approval of the court, becomes subject to the jurisdiction of the court to compel the purchaser to complete the contract of purchase. (*Brasher* v. *Cortland,* 2 Johns. Ch. 505, Kent, Ch.; *Matter of Dennison,* 114 N. Y. 621.) It may be that the trustees in this case are not to be regarded in all respects as officers of the court and that the trust property is not, in full sense, in the custody of the court. The property, none the less 'is brought into the protective arm of the law' and the trustees are 'subject to directions of the court.' Under these circumstances the court should draw no fine distinctions. The statute by necessary

implication confers upon the Court at Special Term jurisdiction over sales made by the trustees from inception to completion, and Paragon Land Corp., having voluntarily entered into such a sale, subject to the approval of the court, has submitted itself to the jurisdiction of the court to give summary directions compelling it to complete its purchase. We find support for this conclusion in analogy between the trustees and receivers in bankruptcy. (See *Mason* v. *Wolkovitch*, 150 Fed. Rep. 699; *Matter of Atlas Cabinet Works, Inc.*, 8 Fed. Supp. 609; *Matter of Dallet Bros., Inc.*, 8 Fed. Supp. 610.)"

The foregoing is contrary to the decisions of this Court. In the case of *Williamson* v. *Berry* (1850), 49 U. S. 495, when called upon to construe a trustee's deed which had been approved by the Court, this court said at page 547:

> "It was also argued, that the sale to De Grasse was a judicial sale. Unless a legal term of definite and unmistakable certainty in all the past application of it shall be made to comprehend a transaction which it has never included before, the sale by Clarke to DeGrasse was not a judicial sale. By judicial sale is meant one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell.
>
> The sale by Clarke to DeGrasse was an attempt by both of them to evade the order of the Chancellor, that every sale, etc., made by Clarke, shall be approved by one of the masters of this Court, and that a certificate of such approval be endorsed upon every deed or mortgage that may be made in the premises. And in no event could a sale by Clarke, in conformity with the order, have been a judicial sale, but simply a sale by a private individual authorized to make it under acts passed for his relief, and assented to by the Chancel-

lor, for the purpose of ultimately substantiating and verifying by a court of record the transfer of the property. It was a sale made without process, not by an officer in any sense of the word, but by a private person to a private person, after negotiation between them, and done by one of them, who had only in a particular way the assent of the Chancellor to sell."

In *Commonwealth Co.* v. *Bradford*, 297 U. S. 613 at page 619, this Court said:

"Property in its (the trustee's) possession is not *in custodia legis* as in case of receivers. *Hinckley* v. *Art Students' League*, 37 F. (2d) 225, 226; *Appeal of Hall*, 112 Pa. 42, 54; 3 Atl. 783; *Strouse* v. *Lawrence*, 160 Pa. 421, 425; 28 Atl. 930; *Goodwin* v. *Colwell*, 213 Pa. 614, 616; 63 Atl. 363; *Nevitt* v. *Woodburn*, 190 Ill. 283, 289; 60 N. E. 500."

The Court of Appeals must have disregarded the aforesaid decisions of this Court in the determination against the petitioner.

Although the trustees under their deed of trust cannot sell real property without first obtaining the consent of the Court nevertheless any order approving such sale is nothing more than judicial consent and can not form the basis of any contention that there was a judicial sale.

In *Kenaday* v. *Edwards*, 134 U. S. 117, at page 125, this Court said:

"That he had the right to surrender his trust, and that it was competent for a court of equity to appoint another person to take the title to the trust property, cannot, in our opinion, be successfully questioned. But the order appointing a new trustee expressly declared that he should at all times be subject to the control and order of the court touching the trust.

> His subsequent sale, therefore, of the property was subject to confirmation or rejection by the court. He could not pass the title without its consent."

In *Christie* v. *Gage*, 71 N. Y. 189, at page 194, the Court said:

> "There is no ground for the contention that the conveyance, having been made by the church in pursuance of the order of the court, obtained on its application, made the transaction a judicial sale, and, therefore, not within the statute. The church, as a religious corporation, organized under the act of 1813, had only a limited capacity to convey. It could convey only under the sanction of the court, and the order obtained in this case was simply the authority for completing its voluntary undertaking to sell the lands in question."

The petitioner contends that there is no analogy between a sale by a trustee or receiver in bankruptcy, as referred to in the opinion of the Court of Appeals, and the agreement of sale by the trustees herein.

A trustee or receiver in bankruptcy is an officer of the Court appointing him, the property sold in bankruptcy is in the possession and custody of the Court and such a sale is a judicial sale.

The trustees herein were appointed pursuant to statutes (Schackno and Mortgage Commission Acts, supra) and are therefore statutory trustees and not officers of the Court.

They had no title to the property which is the subject matter of the stipulation and agreement, because it is undisputed that the County of Nassau owned the same and still owns the same. Even if they had title, the same would be immaterial because even then, the mere approval by the Court would not constitute a judicial sale.

The res was not in the possession of the Court and the Court had and has no control over the same. The Court had and has no jurisdiction to make any order directing the disposition of real property owned by the County of Nassau.

As a matter of fact under the agreement and stipulation the County of Nassau was under no obligation to the trustees unless the Board of Supervisors of Nassau County ratified and approved the stipulation and even then the stipulation had no effect unless the purchaser would take title.

Under the stipulation the purchaser got nothing unless the trustees got title, and if the trustees did not get title, all the purchaser could demand under the agreement was the return of its money and title company charges.

A purchaser at a judicial sale has the right to apply to the Court for relief or to direct the Court's representative to make conveyance under the judicial sale. Can any one possibly contend that if the Paragon Land Corp. at any time had applied to the Court and asked for title, assuming that the County of Nassau was unwilling to convey to the trustees, that the Court would have had the power to direct the trustees and the County of Nassau to convey title to the Paragon Land Corp., even assuming that we were to consider the trustees as officers of the Court.

Judicial sales have been construed as made by the Court. Can any one possibly say that in this case the Court was buying the real property from the County of Nassau in order to sell it to the petitioner? That is what the stipulation and agreement provided for.

It is apparent in the said agreement that the Court was not selling any property through any ministerial officer pursuant to any judgment or order of the Court.

The order appointing the statutory trustees, respondents herein, and approving the plan of rehabilitation of the

mortgage investment, terminated the special proceeding and there is no proceeding pending.

Matter of Lawyers Mortgage Company, 284 N. Y. 325.

The agreement of the trustees to sell lands to the petitioner which they did not own and which agreement was approved by an order of the Court did not constitute a judicial sale and the Court of Appeals erred in so holding.

CONCLUSION.

It is respectfully submitted that this petition should be granted.

SAMUEL OKIN,
Attorney for Petitioner.